No. 13-17-00659-CV

In the Court of Appeals for the Thirteenth Judicial District Corpus Christi, Texas

TEXAS DEPARTMENT OF PUBLIC SAFETY,

Appellant,

v.

LEROY TORRES,

Appellee.

On Appeal from the
County Court at Law Number One, Nueces County
No. 2017-CCV-61016-1

REPLY BRIEF FOR APPELLANT

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ORAL ARGUMENT REQUESTED

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Summary of the Argument

Texas retains its sovereign immunity from private suits for damages under the Uniform Services Employment and Reemployment Rights Act ("USERRA") because Congress has no authority under its War Powers to abrogate state sovereign immunity to private suits for damages in state court, and Appellee's assertions to the contrary are mistaken. The Supreme Court's holding "that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts" is dispositive. *Alden v. Maine*, 527 U.S. 706, 712 (1999). And it is unchanged by *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), which did not create any exception to *Alden* with respect to private suits for damages and does not extend to suits in state court. Appellee's other arguments concerning the scope of Congress's War Powers are both irrelevant and foreclosed by binding precedent.

Even if Congress had the authority to abrogate state sovereign authority through USERRA, it has not unmistakably purported to do so. The jurisdictional provision of USERRA explicitly says that it is subject to "the laws of the State." 38 U.S.C. § 4323(b)(2). The plain meaning of this text includes state laws concerning whether sovereign immunity from suit has been waived. It at least makes unclear whether laws regarding state sovereign immunity are among "the laws of the State" to which USERRA is subject. Since such ambiguity does not make an intention to abrogate state sovereign immunity "unmistakably clear in the language of the statute," *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 56 (1996) (quoting *Dellmuth v. Muth*, 491

U.S. 223, 228 (1989)), USERRA cannot be interpreted to abrogate the State's immunity.

Finally, Texas has not waived its sovereign immunity with respect to private USERRA suits. The limited waiver to which Appellee points for the first time on appeal, Texas Government Code § 437.204, fails for three reasons. First, it does not waive immunity from USERRA suits, or any other suit grounded in federal statutory law. Second, it does not cover the facts upon which Appellee based his USERRA claim. Third, invoking that limited waiver of sovereign immunity requires exhaustion of an administrative process, which Appellee failed to do. Because the State of Texas has not waived its sovereign immunity to private USERRA suits, it may only be sued by the United States on behalf of a USERRA claimant and not by the claimant himself. *Alden*, 527 U.S. at 759–60.

The State therefore retains its sovereign immunity to private damage suits under USERRA, and Torres's claim should be dismissed for lack of subject matter jurisdiction.

ARGUMENT

I. Congress Has No Authority Under its War Powers to Abrogate a State's Sovereign Immunity from Individual Suits for Damages in State Court.

Appellee's characterization of *Alden* and *Seminole Tribe* as limited to the Commerce Clause, *see* Appellee Br. at 2, fundamentally miscomprehends those holdings. *Alden* is not a case about Congress's commerce powers that just happens to include dicta about all other Article I powers. Rather, its holding concerning the scope of

congressional abrogation authority was essential to the judgment in that case. In *Alden*, the Supreme Court explicitly held that the only surrender of immunity in the plan of the convention was that the States surrendered their sovereign immunity from suit *by the federal government*. *Id.* at 755. The States did not surrender, in the original plan of the convention, their immunity from "*private* suit in their own courts," *id*. at 754 (emphasis added), and thus this immunity is "beyond the congressional power to abrogate by Article I legislation," *id*. It was only in adopting the Fourteenth Amendment, which "fundamentally altered the balance of state and federal power struck by the Constitution," *id.* at 756, that the Constitution first "required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution, so that Congress may authorize private suits against nonconsenting States pursuant to its § 5 enforcement power," *id*. Appellee does not dispute that Section 5 authority was not used here. *See* Appellant Br. at 18-19.

Likewise, there is no applicable exception from *Alden* in this case. Any further exceptions to *Alden* and *Seminole Tribe* can only come from the Supreme Court, because "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [lower courts] should follow the case which directly controls, leaving to [the Supreme Court] the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (internal quotation marks omitted). *Alden* is directly on point here, holding "that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state

courts." 527 U.S. at 712. Because courts are still bound by *Alden*'s holding, the State's immunity is intact.

A. *Katz* Did Not Alter *Alden*'s Holding that States are Immune from Private Suits for Damages.

To the extent that Appellee argues, *see* Appellee Br. at 18, that *Katz* created an exception to *Alden* (and it did not), *Katz* still did not overrule *Alden. See Katz*, 546 U.S. at 377-78 (citing *Alden*, 527 U.S. at 713). Appellee ignores the fact that the Supreme Courts of both the United States and Texas continue to acknowledge, post-*Katz*, that the holdings of *Seminole Tribe* and *Alden* remain binding as to all powers granted in the constitution prior to the Fourteenth Amendment, and thus that limiting those decisions to the Commerce Clause would be irreconcilable with binding precedent. *Sossamon v. Texas*, 563 U.S. 277, 283-84 (2011) ("Immunity from private suits has long been considered 'central to sovereign dignity.' . . . For over a century now, this Court has consistently made clear that 'federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'''" (quoting *Alden*, 527 U.S. at 715; *Seminole Tribe*, 517 U.S. at 54)); *Univ. of Tex. at El Paso v. Herrera*, 322 S.W.3d 192, 195 & n.11 (Tex. 2010) (citing *Alden*, 527 U.S. at 754, post-*Katz*, for the proposition that States are immune from private suit in their courts, absent waiver or Congressional abrogation pursuant to Fourteenth Amendment § 5 authority).

These decisions are completely consistent with a proper understanding of *Katz*. *Katz* never purported to authorize all subordination of state sovereignty, and certainly not with respect to private suits for damages. Instead, it only found that "the

power to enact bankruptcy legislation was understood to carry with it the power to subordinate state sovereignty, *albeit within a limited sphere*." *Katz*, 546 U.S. at 377 (emphasis added). And that subordination is narrowly "limited . . . [to] proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts." *Id.* at 378. That limitation was indispensable to the finding that its exception was included in the plan of the convention. As discussed in Appellant's opening brief (Appellant Br. at 16), the *in rem* nature of the proceedings meant that any ancillary infringement of state sovereign immunity would only apply to federal court jurisdiction over a specific piece of property which happened to be in the State's hand, and would thus not subject the State itself to private suits for damages, and accordingly "simply did not contravene the norms this Court has understood the Eleventh Amendment to exemplify," *Katz*, 546 U.S. at 375.

And as noted previously (Appellant Br. at 17, 21-22), other courts have also acknowledged that *Katz* did not qualify *Alden's* rule that no Article I power authorizes Congress to abrogate state sovereign immunity from suits for damages in their own courts. *See Clark v. Va. Dep't of State Police*, 793 S.E.2d 1, 6 (Va. 2016), *cert. denied*, 138 S. Ct. 500 (2017); *Anstadt v. Bd. of Regents of Univ. Sys. of Ga.*, 693 S.E.2d 868, 871 (Ga. App. 2010). It is telling that Appellee cannot cite any court decision which has found otherwise.

Finally, Appellee ignores the fact that, even if *Katz* were an exception to state sovereign immunity from private suit, it only applied to federal court jurisdiction, and would not permit Congress to abrogate state sovereign immunity in *state court*,

where a State's sovereign immunity is even stronger. *See* Appellant Br. at 17-18. Critically, the Texas Supreme Court has reached the same conclusion. *Hoff v. Nueces Cty.*, 153 S.W.3d 45, 48 (Tex. 2004) (noting that, although state immunity in federal courts depends on whether there has been valid congressional abrogation, "immunity protects nonconsenting states from being sued *in their own courts* for federal law claims" (emphasis added)). It is telling that, despite Appellant's prior citation (Appellant Br. at 17), Appellee's briefing completely ignores this binding holding of the Texas Supreme Court as to the applicability of sovereignty immunity in state court.

Accordingly, *Seminole Tribe* and *Alden*'s holdings that the plan of the convention did not include any power for Congress to authorize private damage suits against States in state court remain unaffected by *Katz*. Stretching *Katz* to apply to suits in state courts, or to private suits for damages, overreaches and ultimately conflicts with *Katz*'s purposefully narrow holding.

B. Persuasive Authority Also Rejects Appellee's Argument.

In support of his position, Appellee cites a series of cases which were specifically overruled in the wake of *Seminole Tribe* and *Alden*. Appellee Br. at 9-11. Appellee first cites *Jennings v. Illinois Office of Education*, 589 F.2d 935 (7th Cir. 1979), for the proposition that the War Powers Clause gives Congress the authority to abrogate state sovereign immunity. But *Jennings* was decided prior to *Seminole Tribe*, and the Seventh Circuit has since recognized that *Jennings* is inconsistent with *Seminole Tribe*. *Velasquez v. Frapwell*, 994 F. Supp. 993, 1001 (S.D. Ind. 1998) ("The analysis in *Jennings* . . . is not consistent with the Supreme Court's later decision in *Seminole Tribe*. . . . [T]he focus in *Jennings* . . . on the truly vital role of congressional war powers to

justify abrogation of Eleventh Amendment immunity does not support a limitation on *Seminole Tribe*. In *Seminole Tribe*, the Court deliberately stated its conclusions broadly, in terms of all of Article I."), *aff'd*, 160 F.3d 389 (7th Cir. 1998), *opinion vacated in part on different grounds*, 165 F.3d 593 (7th Cir. 1999). Appellee also cites *Peel v. Florida Department of Transportation*, 600 F.2d 1070 (5th Cir. 1979), another pre-*Seminole Tribe* case whose holding was specifically reversed by the Fifth Circuit. *Ysleta Del Sur Pueblo v. Laney*, 199 F.3d 281, 288 (5th Cir. 2000) ("'*Seminole Tribe* makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers . . . .' The Tribe's argument, therefore, that abrogation is justified by Congress's War Powers is misplaced." (citation omitted)).

The only on-point case Appellee cites that has not been repudiated by the court that issued it is *Diaz-Gandia v. Dapena-Thompson*, 90 F.3d 609, 613 (1st Cir. 1996). *See* Appellee Br. at 17. While it was issued after *Seminole Tribe*, *Diaz-Gandia* was decided before *Alden*'s clarification that *Seminole Tribe* applied to all Article I powers. Thus it is unsurprising that other courts have declined to follow *Diaz-Gandia* for Appellee's point. *See Breaker v. Bemidji State Univ.*, 899 N.W.2d 515, 523 n.13 (Minn. Ct. App. 2017) ("*Diaz* is unpersuasive because the authority on which it relied was based on Supreme Court precedent that has subsequently been overruled. Additionally, *Diaz* was decided before *Alden* . . . ." (citations omitted)); *see also Risner v. Ohio Dep't of Rehab. & Corr.*, 577 F. Supp. 2d 953, 963–64 (N.D. Ohio 2008) (recognizing the instability of *Diaz*).

Critically, because all of the decisions Appellee cites are prior to *Alden*, the Supreme Court was aware of these decisions when it held that *no* Article I power, without exception, could be used to subject States to private suits for damages in their own courts. *Alden*, 527 U.S. at 755. For instance, *Peel* was itself cited in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 15 (1989), and was implicitly part of the arguments which the Supreme Court explicitly rejected in *Seminole Tribe*, 517 U.S. at 72.

It is notable that Appellee can cite no case after *Alden* in which a court has held that the War Powers Clause could permit abrogating a State's sovereign immunity to suit in its own courts. Since *Alden*, courts have *universally* understood that *Alden* applies to all Article I powers, including the War Powers, unless and until the Supreme Court of the United States finds otherwise. *See, e.g.*, Appellant Br. at 21-22.

Nevertheless, Appellee embarks on a foray into some of Hamilton's Federalist Papers, rehashing a historical debate already resolved by the Supreme Court. Appellee Br. at 27-28. The Supreme Court already rejected this rationale in its extensive historical review in *Seminole Tribe* and *Alden*, where the Court concluded that "what is notably lacking in the Framers' statements is any mention of Congress' power to abrogate the States' immunity." *Seminole Tribe*, 517 U.S. at 70 n.13. Contrary to Appellee's assertions, Madison, during Virginia's ratification convention, specifically assured all those considering adopting the original constitution (which of course included all Article I powers—including the War Powers—but not the Fourteenth Amendment and its enforcement clause) that "jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason.

It is not in the power of individuals to call any state into court." *See* 3 J. Elliot, Debates on the Federal Constitution 533 (2d ed. 1836) (quoted in *Seminole Tribe*, 517 U.S. at 70 n.12).

The Supreme Court has also rejected the argument that total cession of a subject matter to the federal government necessarily entails a surrender of state immunity from private suit in that area. *Seminole Tribe*, 517 U.S. at 72 ("[S]tate sovereign immunity . . . is not so ephemeral as to dissipate when the subject of the suit is an area . . . under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."); *see also Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank*, 527 U.S. 627, 636 (1999) (finding that the Patent Clause, despite its plenary grant of power to Congress in the field of patent law, does not provide authority for Congress to abrogate state sovereign immunity with respect to patent claims).

C. *Curtiss-Wright* Cannot Salvage Appellee's Claim.

Appellee's argument (*see* Appellee Br. at 25-27) that *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), precludes state sovereign immunity from private USERRA claims involves a sleight of hand because it equivocates Congress's power to declare and conduct war with its power to enact laws necessary and proper to the exercise of its War Powers. Although it is true that States did not retain war powers upon joining the union, they did retain sovereign immunity from all private

suits in their own courts. *Alden*, 527 U.S. at 712 ("[T]he powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts."). Accordingly, the mere fact that Congress has determined that certain employment protections are necessary and proper to effectuate its War Powers does not magically shield those employment law disputes from the State's sovereign immunity from private suits for damages.[1]

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[1]Even if this Court were to credit Appellee's unsupported assertion (Appellee Br. at 27) that States which never had war powers also never had sovereign immunity from employment law suits that might affect the federal government's War Powers, the *Curtiss-Wright* rationale would still be inapplicable with respect to Texas, which, prior to joining the United States, conducted war in its sovereign capacity as the Republic of Texas. *See, e.g.*, Jason C. Nelson, *The Application of the International Law of State Succession to the United States: A Reassessment of the Treaty between the Republic of Texas and the Cherokee Indians*, 17 Duke J. Comparative & Int'l L. 1, 44-45 (2006) (noting the legitimate exercise of both war powers and treaty powers by the Republic of Texas prior to its annexation by the United States). In fact, unlike other States prior to their admission to the Union, Congress specifically recognized the Republic of Texas as an independent sovereign prior to the time it was admitted to the Union as a State. *See* Adam Clanton, *The Men Who Would Be King: Forgotten Challenges to U.S. Sovereignty*, 26 UCLA Pac. Basin L.J. 1, 33 (2008) (noting that the United States recognized Texas as an independent sovereign in 1837, but did not annex it as a State until 1845); *see also United States v. Texas*, 162 U.S. 1, 33 (1896) (finding that "[C]ongress consented that 'the territory properly included within and rightfully belonging to the republic of Texas' might be erected into a state to be admitted into the Union"). Accordingly, even if Appellee's equivocation between War Powers and other sovereign powers necessary and proper to the exercise of War Powers, Texas, unlike States that never had war powers, would merely have ceded their actual war powers upon joining the United States, while retaining sovereign immunity to private suits for damages in that area like all States did in all policy areas ceded to the federal government but initially retained by the States. *See Fla. Prepaid*, 527 U.S. at 636

Appellee speaks as if USERRA were an act of the War Powers themselves. Strictly speaking, this is not the case. The War Powers are listed in the Constitution as the powers

> [t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

U.S. CONST., art. I, § 8. Regulating employment discrimination against members of the armed forces serving in civilian capacities is not one of the War Powers listed in the Constitution. *Id.*

Instead, USERRA, properly understood, is an exercise of powers "necessary and proper" to the exercise of Congress's War Powers. *See, e.g.*, *Lichter v. United States*, 334 U.S. 742, 758 (1948) (distinguishing between the power to raise and support armies and the power to make laws necessary and proper to effectuating that

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(finding that despite ceding plenary authority over patent law to Congress in Article I Section 8, States reserved their sovereign immunity from private suits for damages with respect to patent claims, just as they did with respect to all other powers ceded to Congress in Article I).

power, and finding that the proper question, when determining whether an act authorizing compulsory renegotiation of excessive profits under existing contracts between private parties for war goods in time of war was constitutional, was whether the act was "necessary and proper" for the exercise of Congress's War Powers); *see also Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U. S. 146, 155 (1919) (distinguishing between an exercise of War Powers and acts necessary and proper to effectuate the War Powers, and sustaining war-time prohibition of the sale of distilled spirits as a measure "necessary and proper" for carrying into execution the War Powers); *Arver v. United States*, 245 U.S. 366, 377 (1918) (distinguishing between an exercise of War Powers and acts necessary and proper to effectuate the War Powers, and sustaining an act imposing involuntary military duty upon citizens as "necessary and proper for carrying into execution" the War Powers); *Stewart v. Kahn*, 78 U.S. 493 (1870) (upholding, as necessary and proper to carry into effect the granted War Powers, a federal statute that tolled limitations periods for state-law civil and criminal cases for the time during which actions could not be prosecuted because of the Civil War) (cited in *Jinks v. Richland Cty., S.C.*, 538 U.S. 456, 461–62, (2003)).

State sovereign immunity is a sovereign attribute completely distinct from the War Powers, and thus whether or not States had war powers is irrelevant to whether they have sovereign immunity from private suits, even if Congress thinks that such a suit would be a necessary and proper means of effectuating its War Powers. *Velasquez v. Frapwell*, 160 F.3d 389, 393 (7th Cir. 1998), *opinion vacated in part on different grounds*, 165 F.3d 593 (7th Cir. 1999). As the Seventh Circuit has astutely pointed out,

> Even if it is true that the states did not surrender their war powers to the federal government in the Constitution because they didn't have such powers (having previously surrendered them, according to *Curtiss–Wright*, to the Continental Congress), it doesn't follow that they surrendered any part of their sovereign immunity *from a suit seeking money from the state treasury*. That immunity is an independent attribute of sovereignty rather than an incident of the war power or of any other governmental power that a state might or might not have.

Id.

The question of whether subjecting States to private USERRA suits without their consent is necessary and proper to the effectuation of Congress's War Powers has already been definitively answered by the Supreme Court, which has specifically concluded that the Necessary and Proper Clause cannot be used in conjunction with *any* Article I power to abrogate a State's sovereign immunity to suit. *Alden*, 527 U.S.at 732 ("Nor can we conclude that the specific Article I powers delegated to Congress necessarily include, by virtue of the Necessary and Proper Clause or otherwise, the incidental authority to subject the States to private suits as a means of achieving objectives otherwise within the scope of the enumerated powers."). Put simply, the abrogation of state sovereign immunity from private suit is not a necessary or proper means of accomplishing any Article I power, and thus any congressional attempt to abrogate a State's immunity from private suit using that power is "'merely [an] ac[t] of usurpation' which 'deserve[s] to be treated as such.'" *Id.* at 733 (alterations in original) (quoting *Printz v. United States*, 521 U.S. 898, 924 (1997)). Accordingly, if Congress finds that a State's action hinders its War Powers, it may authorize the federal government to bring suit against the State, but Congress

has no power to subject the State to private damage suits brought at the whim of private individuals.

* * *

In sum, as the Supreme Court has held, "the Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits." *Alden*, 527 U.S. at 724. That immunity has not been abrogated by USERRA.

II. Congress Did Not Unmistakably Evince an Intent to Abrogate State Sovereign Immunity in the Text of USERRA.

Not only does USERRA not abrogate state sovereign immunity, it does not approach the clarity the Supreme Court requires a statute to have in order to do so. *Seminole Tribe*, 517 U.S. at 56 ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." (quoting *Dellmuth*, 491 U.S. at 228)). In fact, the clear language of the statute points in the exact opposite direction—USERRA is subject to "the laws of the State," including laws related to waiver of sovereign immunity. 38 U.S.C. § 4323(b)(2). Appellee's claim that "Congress did not use that language, or any other language that stated such an intent" is simply false. Appellee Br. at 37. Congress may not have included Appellee's preferred language, but the language that it did include clearly evinces an intent to subordinate private USERRA claims against a State to state-law limitations. Furthermore, to the extent that the

text is ambiguous as to whether private USERRA claims are subordinate to state sovereign immunity, this Court must construe it as *not* abrogating state sovereign immunity. *See Seminole Tribe*, 517 U.S. at 56.

With regard to the clear limitation in 38 U.S.C. § 4323(b)(2) that private USERRA suits against States may only be brought if they are "in accordance with the laws of the State," Appellee's attempts to escape the plain meaning of the statute are unavailing. Appellee's argument that the "laws of the State" cannot include sovereign immunity fundamentally miscomprehends the interplay between the Constitution and state sovereign immunity. *See* Appellee Br. at 37 (asserting that "[s]tate sovereign immunity emanates from federal constitutional principles, including the Eleventh Amendment, not the laws of any state. While a state can waive its immunity through its laws, the immunity itself flows from the Constitution."). This is simply false; a state's sovereign immunity "neither derives from, nor is limited by, the terms of the Eleventh Amendment," but instead, "as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution," *Alden*, 527 U.S. at 713. Accordingly, where it has not been abrogated by a valid exercise of Congress's Fourteenth Amendment § 5 authority, the State's immunity from suit turns solely on whether the State has waived its immunity, a question of state law. *See* Tex. Gov't Code § 311.034.

Consideration of the broader context of 38 U.S.C. § 4323 likewise does not make clear any intention to abrogate state sovereign immunity. If Congress intended to subject States to suits to the same extent a private employer would be subjected,

Congress would have merely included the state in the definition of an employer, and then written one jurisdictional provision for all employers, but it did not. *See* 38 U.S.C. § 4323. Instead, Congress allowed private employers to be sued without restriction, but only allowed suits against States as employers to proceed if they were "in accordance with the laws of the State." *Id.*

Tellingly, Appellee not only fails to cite a single case construing "laws of the State" to definitively exclude state laws regarding waivers of sovereign immunity, he also fails even to address the holdings of the Supreme Courts of Alabama and Delaware, and the Court of Appeals of Georgia, that the "laws of the State" include the State's laws concerning whether sovereign immunity is waived. *See* Appellant's Br. at 11-12. The only decision Appellee responds to on this issue is *Smith v. Tennessee National Guard*, 387 S.W.3d 570, 574 (Tenn. Ct. App. 2012), which Appellee briefly dismisses for not taking a broad enough view of USERRA for Appellee's liking and elsewhere claims that the Tennessee legislature "overruled" *Smith*'s holding that Congress did not unmistakably abrogate state sovereign immunity to private USERRA suits. *See* Appellee Br. at 33. This is not precisely accurate. Rather, Tennessee Code § 29-20-208, which Appellee incorrectly cites, did not "overrule" *Smith*'s holding concerning congressional abrogation, but rather it merely waived the State's immunity to suit. This action only reinforces *Smith*'s holding that Congress did not abrogate state immunity to private USERRA suits: since Congress did not unmistakably abrogate state sovereign immunity in § 4323(b)(2), the only way for USERRA to apply in Tennessee was for Tennessee to waive its immunity so that USERRA suits could be brought "in accordance with the laws of the State." 38

U.S.C. § 4323(b)(2). Even if the plain language of the statute were disregarded and Appellee's interpretation were held to be an acceptable interpretation, these decisions, the broader context of the statute, and the strict construction of "laws of a state," thoroughly demonstrate that Congress did not make an intent to abrogate state sovereign immunity "unmistakably clear in the language of the statute." *Seminole Tribe*, 517 U.S. at 56.

Finally, with regard to the usage of "may" rather than "shall" in 38 U.S.C. § 4323(b)(2), Appellee offers a plausible alternative interpretation to the one in Appellant's opening brief. *Compare* Appellee Br. at 39-41, *with* Appellant Br. at 12-13. The test for whether Congress has abrogated a State's immunity, however, is not whether there is a plausible interpretation under which it *might* have done so, but rather whether the text of the statute is "unmistakably clear" in doing so. *Seminole Tribe*, 517 U.S. at 56. Furthermore, the Ninth Circuit has interpreted the use of "may" rather than "shall" in 38 U.S.C. § 4323(b)(2) as denoting something completely different than Appellee's proposed interpretation. *See Townsend v. Univ. of Ala.*, 543 F.3d 478, 483 n.2 (9th Cir. 2008) (noting that "Congress did not use the terms 'must' or 'shall' with respect to state court jurisdiction over USERRA claims for the apparent reason that 'the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts.'" (quoting *Alden*, 527 U.S. at 712)), *cert. denied*, 566 U.S. 1166 (2009). Surely the language of the statute is not "unmistakably clear" as to Appellee's preferred interpretation when a Circuit Court of the United

States has found otherwise. And without such an indication of abrogation in the text of the statute, Appellee's argument fails.

III. Texas Has Not Waived Immunity to Suit Under USERRA.

Appellee's novel argument (Appellee Br. at 42-47) that Texas has waived its sovereign immunity in this case flies in the face of both binding law and common sense. The fact that the State waives sovereign immunity if certain conditions are met does not mean that sovereign immunity is waived when those conditions are not met.

The limited waiver of immunity to which Appellee refers is contained in Texas Government Code § 437.204, which provides that an employee whose statutory rights under that section have been violated may "file a complaint with the Texas Workforce Commission civil rights division under Subchapter I." Tex. Gov't Code § 437.204(b).[2] Notably, this does not waive sovereign immunity to all suits brought to enforce the provisions of § 437.204, but only waives immunity from suits brought pursuant to the procedure detailed in Subsection I, which is contained in Texas Government Code § 437.401-.419. Furthermore, Subsection I contains many limitations and requirements which must be met before an individual may claim the limited waiver of sovereign immunity contained in § 437.204. For instance, contrary to Appellee's erroneous assertion, nowhere in the statutory scheme is a plaintiff given a

[2] Although Appellee's brief references various other statutory sections, each of those either do not contain provisions waiving sovereign immunity by allowing their provisions to be enforced by suit, or they are subsections of Subchapter I, which details the enforcement procedures for § 437.204 and is discussed *infra*.

right to file a civil suit to enforce the statute unless he has first exhausted the prescribed administrative process in Subsection I. Rather, § 437.204 only provides the right to initiate the process in Subsection I by filing a complaint with the Texas Workforce Commission, not a right to file suit.

Looking to the procedures prescribed in Subsection I, Appellee erroneously cites § 437.412 as entitling an individual to enforce § 437.204 by civil suit without an administrative process. *See* Appellee Br. at 43, 45. Appellee ignores, however, that § 437.412 only allows a potential plaintiff to file a civil suit "[w]ithin 60 days after the date a notice of the right to file a civil action is received." Tex. Gov't Code § 437.412. The only way to receive such a "notice of the right to file a civil action" is to complete the administrative process prescribed in the rest of Subsection I by filing a complaint under § 437.402, which, if denied under § 437.408, then and only then entitles an individual to a "notice of the complainant's right to file a civil action." *See* Tex. Gov't Code § 437.411(a) ("A complainant who receives notice under Section 437.408 that the complaint is dismissed or not resolved is entitled to request from the commission a written notice of the complainant's right to file a civil action.").

Appellee's cherry picked references to the statute take a valid observation—that a complainant "may" (rather than "shall") file a complaint under § 437.402—but then, without analyzing the rest of the statute, draw the erroneous conclusion that a complainant may skip the administrative process. *See* Appellee Br. at 46. A potential plaintiff "may" file a complaint, but of course the statute does not say he "shall" file a complaint because it also allows him to instead pursue other alternative dispute

resolution "including settlement negotiations, conciliation, facilitation, mediation, fact-finding, minitrials, and arbitration." Tex. Gov't Code § 437.403. What the Legislature never authorizes (and thus does not waive sovereign immunity to) is a suit which is not brought according to the prescribed procedures of Subsection I. *Id.* § 437.411; *see also* Allen R. Vaught, *Reservists' Rights*, TRIAL, Nov. 2014, at 52, 55 n.41 (noting that Texas requires that the administrative procedure be exhausted prior to bringing a suit to enforce § 437.204).

Additionally, even if Appellee's case qualified under § 437.204, and it does not, the legislature has only waived immunity for claims under the compensatory damage caps specified in § 437.416 and has also limited liability for back pay to only that which accrued no more than "two years before the date a complaint is filed with the commission." Tex. Gov't Code § 437.415(c). Because no complaint was filed with the commission, the State has thus also not waived its sovereign immunity from suit for any back-pay damages with respect to Appellee in this case.

Finally, the alleged conduct for which Appellee asserts a claim under USERRA, namely a failure to accommodate his request to be given a position other than his original position, *see* CR.25, is not even covered by § 437.204. Texas has never waived its sovereign immunity from claims asserting that an individual was denied a reasonable accommodation. To the limited extent that § 437.204 waives immunity from suit after the prescribed administrative process is exhausted, it does so for claims that an individual's right "to return to *the same employment held* when ordered to training or duty" was violated. Tex. Gov't Code § 437.204(a) (emphasis added). Accordingly, even if all the requirements of Subsection I had been met the legislature

still would not have waived sovereign immunity to Appellee's claim. Notably, Appellee is not bringing a suit under § 437.204, nor could he, since he has made no showing of meeting its requirements.

Both Texas courts and the Supreme Court of the United States have consistently held that one cannot claim a waiver of sovereign immunity without meeting the jurisdictional limitations of that waiver, including administrative exhaustion requirements, notice, and statutes of limitations. *See, e.g.*, Tex. Gov't Code § 311.034 (noting that sovereign immunity is not waived and courts are without jurisdiction to address claims that do not meet the statutory prerequisites to a suit); s*ee also Texana Cmty. MHMR Ctr. v. Silvas*, 62 S.W.3d 317, 324-25 (Tex. App.—Corpus Christi 2001, no pet.); *State v. Kreider*, 44 S.W.3d 258, 262-63 (Tex. App.—Fort Worth 2001, pet. denied); *Streetman v. Univ. of Tex. Health Sci. Ctr. at San Antonio*, 952 S.W.2d 53, 55 (Tex. App.—San Antonio 1997, writ denied); *Reese v. Tex. State Dep't of Highways*, 831 S.W.2d 529, 530-31 (Tex. App.—Tyler 1992, writ denied); *cf. Bd. of Regents of Univ. of State of N.Y. v. Tomanio*, 446 U.S. 478, 492 (1980) (holding 42 U.S.C. § 1983 action barred by state statute of limitations, and that such limitations on judicial review of constitutional rights posed by state statutes are generally consistent with the Constitution and federal law).

Of particular relevance here, the Texas Supreme Court has held that judicial review can be limited by procedural statutes that channel claims through an administrative review process first. *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 530 (Tex. 1995) (holding that, where the constitutionality of restrictions on judicial review of administrative proceedings, including a denial of *de novo* review, were

challenged, "[j]udicial review of agency orders under the substantial evidence rule does not per se violate the right to trial by jury."); *see also Temple Indep. Sch. Dist. v. English*, 896 S.W.2d 167, 169 (Tex. 1995) ("The failure to file a timely motion for rehearing [as required by a statute's administrative exhaustion requirements] deprives the district court of jurisdiction to review the agency's decision on appeal.").

Appellee again cites *Ramirez v. State of New Mexico Children, Youth and Families Department*, 372 P.3d 497 (N.M. 2016) and *Scocos v. State of Wisconsin Department of Veteran Affairs*, 819 N.W.2d 360 (Wis. App. 2012), but this time as examples of "similar . . . statutory scheme[s]." Appellee Br. at 45. In reality, neither of the statutory schemes at issue in those cases bear the slightest resemblance to Texas's statutory scheme. In *Ramirez*, the statute which the New Mexico Supreme Court found to waive New Mexico's sovereign immunity from suit under USERRA explicitly provided that "[t]he rights, benefits and protections of the federal Uniformed Services Employment and Reemployment Rights Act of 1994 shall apply to a member of the national guard ordered to federal or state active duty for a period of thirty or more consecutive days." 372 P.3d at 505 (quoting N.M. Stat. § 20-4-7.1). In *Scocos*, the statute which the Wisconsin court of appeals found to waive Wisconsin's immunity provided "that the discharge of persons restored to state employment under § 321.64(1) is 'subject to all federal . . . laws affecting any private employment.'" 819 N.W.2d at 366 (alteration in original) (quoting Wis. Stat. § 321.64(2)).

Appellee's assertions might be plausible if, instead of the statutory structure actually in place in Texas, § 437.204 were to say that civil suits could be brought "subject to all federal laws." But Texas's statute does not mention federal law at all, let

alone USERRA by name. It only waived immunity with respect to claims brought in accordance with Subsection I, which this case was not. The fact that USERRA was in place at the time that § 437.412 was passed is further evidence against Appellee's theory. If the Legislature intended to waive claims to USERRA suits, then it would have just said so, as did the statute at issue in *Ramirez*. Instead, the fact that Texas made a statute with a significantly narrower scope and more limited remedies instead shows a clear intent not to waive immunity to USERRA, since the limitations would be pointless if a plaintiff could just turn around and sue under USERRA instead. Texas has not waived its sovereign immunity to any private suit under USERRA, and it certainly has not done so with a "clear and unambiguous" waiver. Tex. Gov't Code § 311.034.

Prayer

The Court should vacate the trial court's order denying DPS's jurisdictional plea, and dismiss the case for lack of subject-matter jurisdiction.

Respectfully submitted.

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Certificate of Service

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Microsoft Word reports that this brief contains 6,561 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

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